the conduct of judicial candidates to ensure they perform and appear to perform impartially once in office. It is another to regulate the commentary of third parties about candidates, as in *Eu*, on the theory that the State can "enhanc[e] the ability of its citizenry to make wise decisions by restricting the flow of information." *Id.* at 228-229.

B. The Eighth Circuit's Analysis—And Respondents' Defense Thereof—Is Unpersuasive

1. With respect to the prohibition on personal solicitation, respondents do not dispute the legitimacy of the State's concern about judges appearing to "decide cases in accordance with the wishes of their campaign contributors," but urge that those concerns do not indict the Eighth Circuit's decision so much as "contributions to judicial candidates generally." Br. in Opp. 20. Not so. Campaign funding is a necessity when judges are elected, but that does not mean that States should be hamstrung in their efforts to minimize its impact (real and perceived) on judicial impartiality. Minnesota has attempted to mitigate that impact by separating the judge from fundraising, requiring all contributions to be solicited by campaign committees—not the judges or judicial candidates who will be expected to preside impartially over cases involving those solicited. Pet. 14-15.

Like the court of appeals, respondents urge that the ban on personal solicitation is unconstitutional because Minnesota's rules also bar judges from learning the identities of their contributors. Br. in Opp. 20. It is far from clear that the State's decision to enact one proscription can render another unconstitutional (at least without allowing the State to choose between them). See Br. Concerned Corporations 19-20. In any event, respondents leave virtually unanswered the appearance of impropriety that remains whenever litigants and lawyers receive a personal request for money from the person who is supposed to preside impartially over their cases. *Id.* at 6-8; Pet. 14-15. They leave unanswered what conceivable First Amendment value is served by having the judge rather than the campaign committee make a request for money, other than the (coercive) implication that the judge has

a personal interest in the contributions. *Stretton* v. *Disciplinary Bd.*, 944 F.2d 137, 146 (3d Cir. 1991). They offer no reason to think the standard here should be strict, rather than intermediate, scrutiny. See Pet. 26; Br. Former Chief Justices 5-7; Br. Concerned Corporations 17. And they ignore the fact that, notwithstanding the prohibition on disclosing the identity of donors, judges may learn (and litigants may fear that judges will learn) who did and did not contribute by a variety of means. See Br. State Amici 14 & n.10 (citing Pet. App. 84a) (Gibson, J., dissenting); Br. Concerned Corporations 19.

2. Respondents' attempt to prove the invalidity of partisan activities restrictions fares no better. Respondents do not seriously dispute that judicial candidates and judges may become or appear "'beholden' to political parties if they seek [the parties'] endorsement." Br. in Opp. 21; see Br. Concerned Corporations 9-10. Rather, they repeat the Eighth Circuit's assertion that Minnesota's restriction on partisan affiliation is "woefully underinclusive" because it addresses only party affiliation and not affiliation with special interest groups. Br. in Opp. 22. The Hatch Act upheld in *Letter Carriers*, however, operates in precisely the same fashion. The reason is simple: "Political parties have influence and power * * * that vastly exceeds that of any interest group." *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 188 (2002).

While respondents attempt to distinguish the Hatch Act on the ground that it applies only to employees, that distinction is unavailing. Like the provisions at issue here, the Hatch Act's prohibition on partisan activities does not address relationships with special interest groups apart from political parties. If the restrictions at issue here are fatally underinclusive for failure to address interest-group associations, the Hatch Act is fatally underinclusive as well.[3]

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[3] Respondents also err in asserting that Minnesota, by choosing to select judges by election, "assume[d] there will be controversial rivalries and policy differences * * * —and political party support of certain candidates is merely one expression of those differences." Br. in Opp. 18. Like many other States, Minnesota adopted elections to *prevent*

IV. The Court Should Hear This Case This Term

The need for this Court's review is not merely compelling—it is urgent. In 2006, 30 States will hold elections for their supreme courts. Absent prompt review, many States in the Eighth and Eleventh Circuits (including Minnesota) will endure elections, with lasting consequences, without the important protections of the judicial canons invalidated below. Outside those circuits, ethics enforcement officers with responsibilities for important elections will confront grave uncertainty over which rules they can enforce, and candidates will be left in the "untenable" position of either forgoing activities the Eighth and Eleventh Circuits have deemed constitutionally protected, or "violat[ing] [canons] that [may] ultimately [be] deemed constitutional and suffer[ing] * * * punishment" as a result. Br. ABA 9.

Petitioners therefore respectfully request that the Court not only grant the petition for a writ of certiorari, but that it also set the case for argument and decision this Term to the extent consistent with the Court's calendar. To that end, petitioners propose filing their opening brief 31 days after the Court acts on the petition rather than the 45 days allowed under this Court's Rule 25.1. That would place the case on the same schedule as cases granted on the Court's January 9, 2006 orders list, permit the full 35 days for the filing of respondents' brief under this Court's Rule 25.2, and allow time for reply under Rule 25.3 before the April argument session.

* * * * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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partisan influence on the judiciary. Pet. 2; CCJ Br. 13-15; see Debates and Proceedings of the Minn. Const. Conv. 503 (St. Paul, Earle S. Goodrich, Territorial Printer 1857) (Del. Emmett) ("the people are much better qualified" to select judges because the "Governor always selects men belonging to his own political party, while the people often select them regardless of parties"); *id.* at 505-506 (Del. Flandrau) (because "the people" are not "politicians or partizans," popular ballot provides greater "safeguards" against partisanship). Minnesota adopted elections to minimize party influence on the judiciary—not expand it.

Respectfully submitted.

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In The Supreme Court of the United States

MARTHA HOLTON DIMICK, CHAIRPERSON, MINNESOTA BOARD ON JUDICIAL STANDARDS, *et al.*,

Petitioners,

v.

REPUBLICAN PARTY OF MINNESOTA, *et al.*,

Respondents.

On Petition For A Writ Of *Certiorari* To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* THE AMERICAN JUDICATURE SOCIETY IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI*

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BRIEF OF THE AMERICAN JUDICATURE SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR *CERTIORARI*

This *amicus curiae* brief is submitted on behalf of the American Judicature Society.[1] Petitioners and Respondents have consented to the filing of this brief. The correspondence regarding the American Judicature Society's requests for consent have been filed in the office of the Clerk.

I. INTEREST OF *AMICUS CURIAE* THE AMERICAN JUDICATURE SOCIETY

Founded in 1913, the American Judicature Society ("AJS") is a national, nonpartisan organization with members from every state who are judges, lawyers, and lay people dedicated to improving the administration of justice. A nonprofit corporation, it is funded through members' dues, contributions, and grant funds for special projects. For 92 years, AJS has spoken with a credible and independent voice on administration of justice issues and has demonstrated a continuing commitment to high ethical standards for judges and judicial candidates.

AJS's interest as *amicus curiae* in this case arises from its involvement and expertise in judicial selection, ethics, and independence. AJS's work in all three areas

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[1] None of the parties to this case had any role in writing this brief and no one other than AJS counsel made a monetary contribution to the preparation or submission of this brief. As a matter of policy and procedure, no judicial member of AJS participated in the decision to file this brief or in its preparation. No inference should be drawn that any judge member of AJS's board of directors has participated in the adoption or endorsement of the positions of this brief.

provides a unique, national perspective on the impact of the decision below.

From its founding, AJS has been a consistent voice in favor of reform of the process of judicial selection to ensure a bench of the highest quality. Since 1991, AJS has conducted its programs and activities in this area through the Elmo B. Hunter Citizens Center for Judicial Selection. For much of its existence, AJS has been a proponent of merit selection of judges, that is, selecting judges through a bi-partisan appointment process followed by a nonpartisan retention election,[2] rather than in political contests.

While continuing to favor merit selection, AJS has sought improvements of elective systems in recent years. Because some voters are reluctant to give up the accountability of elective systems, AJS realized that it should no longer ignore opportunities to promote intermediate reforms that could immediately benefit the majority of citizens and judges. Moreover, "attack politics" have been imported into retention elections, making issues of campaign speech and fund-raising relevant even in merit selection states.

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[2] Although systems vary in particulars, in general, merit selection is a system in which a state establishes a bi-partisan nominating commission that includes members of the legal community as well as citizens. When a vacancy occurs on a court, interested individuals submit their applications to this nominating commission. After conducting interviews and assessing the qualifications of the applicants, the commission submits the names of the three to eight most qualified to the governor, who appoints one to the judgeship. Subsequently, the judge is periodically placed on the ballot without an opponent, and voters decide whether to retain the judge in office. Currently, 14 states use this method to appoint some or all of their judges.

Therefore, AJS is currently addressing both nonpartisan merit selection reforms and improving the process of elective systems, giving AJS a helpful perspective on the issues of campaign speech and fund-raising implicated by the decision below. For instance, the Hunter Center has compiled comprehensive information on judicial selection processes in each of the 50 states and the District of Columbia and made it available on-line.[3] This website is the leading resource for information about the methods of selecting, retaining, and removing judges from the bench in each state and includes information about successful and failed reform efforts, the roles of political parties, interest groups, and professional organizations in judicial selection, and the diversity of the state courts. It is regularly cited by reference works, scholars, legal professionals, reform organizations, and the media.

AJS also brings together relevant stakeholders to discuss current, critical problems in judicial selection. AJS regularly collaborates with state and national organizations, including the National Center for State Courts, the American Bar Association, and state bar associations. Moreover, AJS's mid-year meeting, in February 2006, titled "Re-thinking Strategies for Judicial Selection Reform," will be a major national summit to discuss theoretical and practical issues relating to all types of judicial selection.

In 1997, AJS established the Center for Judicial Independence in response to an increase in unfair criticism of, and efforts to remove from the bench, judges who have issued unpopular rulings. Subsequently, in 2004, AJS

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[3] URL: http://www.ajs.org/js/

established the Task Force on Judicial Independence and Accountability. The Task Force has three goals: (1) to monitor developments bearing on judicial independence and accountability at the federal and state levels; (2) to respond to unwarranted attacks on the judiciary and to highly visible situations demonstrating a failure of judicial accountability; and (3) to sponsor programs and educate the public on the relevant issues.

AJS's involvement in judicial ethics also gives it an important perspective on the ramifications of the decision below. Through its Center for Judicial Ethics, AJS provides a forum for the exchange of information on judicial discipline and promotes the enforcement of judicial ethics standards. Advancing high standards of conduct in judicial election campaigns has always been one of the focuses of the Center because public confidence in a judge's decisions is based not only on what takes place on the bench but also on how the judge campaigned for the office. In 1990, AJS published two monographs on judicial election campaigns, and in 2000, it published a judicial ethics curriculum on communicating with voters.

Because of its historical and continuing commitment to high ethical standards for judges and judicial candidates, AJS has closely followed and been actively involved in developments across the country since this Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002). The Center for Judicial Ethics has tracked First Amendment challenges to canon restrictions based on *White*, followed cases in which judges have been disciplined for campaign violations, and surveyed changes to codes of judicial conduct prompted by *White*. The Center

has posted a document describing the developments following the decision on its web-site,[4] with new developments added as they occur. In addition, the implications of both this Court's decision and the decision below will be discussed at AJS's mid-year meeting in February 2006.

Because of its national perspective on judicial selection, ethics, and independence and on the importance of the *White* decision, AJS respectfully requests that this Court consider the following arguments in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Eighth Circuit in *Dimick v. Republican Party of Minnesota*, No. 05-506.[5]

II. SUMMARY OF ARGUMENT

Federal and state courts throughout the country are analyzing the extent and effect of this Court's decision in *White*. Though that decision was limited to the constitutionality of Minnesota's "announce clause," many other types of restrictions on judicial conduct are being examined (including "partisan activity" and "solicitation" clauses similar to those under consideration here), often with widely varying results. The writ of *certiorari* should be granted so that this Court can provide necessary guidance to lower courts by more fully defining the constitutional boundaries of judicial campaign regulation.

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[4] URL: http://www.ajs.org/ethics/pdfs/DevelopmentsafterWhite.pdf

[5] If this Court grants the petition for a writ of *certiorari*, AJS anticipates seeking to file a longer brief on the merits, elaborating the reasons why the decision below was not required by this Court's decision in *White* and the respects in which the Eighth Circuit's decision subordinates compelling state interests.

III. ARGUMENT

The Petition for a Writ of *Certiorari* Should Be Granted to Address the Uncertainty That Exists in State and Federal Courts Regarding Regulation of Judicial Elections.

If left standing, the decision below would have repercussions beyond Minnesota. The Eighth Circuit held unconstitutional clauses in the Minnesota code of judicial conduct (1) prohibiting judges or judicial candidates from identifying themselves as members of a political organization, attending political gatherings, and seeking, accepting, or using endorsements from a political organization and (2) prohibiting judicial candidates from personally soliciting campaign contributions from large groups and transmitting solicitations above their personal signatures (the extent of the plaintiffs' challenge). *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005). At least 17 states (including Minnesota) have chosen to select their judges through nonpartisan elections, and the decision raises doubts about the constitutionality of that choice and any efforts states may make to reflect that choice in the code of judicial conduct. Of the 41 states that have some type of election for judges, 30 (including Minnesota) prohibit personal solicitation of contributions by the candidate. Most states, regardless of how they choose their judges, restrict judges, if not candidates, from attending political gatherings.

The effects of the decision below are already being felt. On December 1, 2005, based on the decision, the South Dakota Supreme Court amended that state's code of judicial conduct to allow a judge or candidate to identify himself or herself as a member of a political party at any time despite a statutory requirement that judicial elections be nonpartisan.

Moreover, the South Dakota code now expressly allows a candidate to personally solicit campaign contributions and does not even include any of the limitations on solicitation contained in the decision below. Further, the amendments lifted the prohibitions on acting as a leader in a political organization, attending political gatherings, paying an assessment to or making a contribution to a political organization or candidate, and purchasing tickets for political party dinners or other functions. *In the Matter of the Amendment of SDCL Chapter 16-2 Appendix; SDCL Chapter 16-1A Appendix; and Repeal of SDCL Chapter 12-9*, Rule 05-3 (S.D. December 1, 2005).[6]

In *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), this Court held that states cannot, consistently with the First Amendment, prohibit judicial candidates from announcing their views on disputed legal and political issues. That holding directly affected only the nine states that had the "announce clause" in their codes of judicial conduct on the date the decision was issued.

United States Supreme Court decisions on judicial ethics are very rare, however, and the Court's analysis included extensive discussions of the principle of judicial impartiality and the role of the judge. Therefore, in the three and a half years since the decision, state supreme courts, judges, lawyers, and others in all 50 states have carefully parsed the Court's majority opinion, two concurring opinions, and two dissenting opinions to try to forecast what the Court would do if presented with a host of other challenges to the code of judicial conduct. The decision below is only one example of lower courts' application of

[6] URL: http://www.sdjudicial.com/downloads/sc/rules/y2005/r0513.pdf.

this Court's reasoning in *White* to a variety of issues arising in judicial codes of conduct.

Notably, state supreme courts (which are responsible for adopting the codes of conduct for judges and judicial candidates) have adopted conflicting interpretations of this Court's decision. Relying on this Court's statements in *White* that it was not addressing the constitutionality of the "pledges and promises clause" or the "commit clause" adopted in many states,[7] the Supreme Court of Florida and the New York Court of Appeals have upheld the constitutionality of those provisions and disciplined candidates for violating them by using pro-prosecution rhetoric during a campaign. *Inquiry Concerning Kinsey*, 842 So.2d 77 (Fla.), *cert. denied*, 540 U.S. 825 (2003); *In the Matter of Watson*, 794 N.E.2d 1 (N.Y. 2003). The court in *Kinsey*, for example, held that "it is beyond dispute" that the clauses serve a compelling state interest in preserving the integrity of our judiciary and maintaining the public's confidence in an impartial judiciary.

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[7] The American Bar Association Model Code of Judicial Conduct contains provisions that prohibit judicial candidates from making "pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office" and "statements that commit or appear to commit the candidate with respect to cases, controversies or issues that are likely to come before the court." Model Code of Judicial Conduct Canon 5A(3)(d)(i) and (ii) (1990). Those provisions, particularly the pledges and promises clause, have been adopted in many states. In its decision, this Court noted the pledges and promises clause was not challenged in the case and that it was not expressing a view on its constitutionality. *White*, 536 U.S. at 770. With respect to the commit clause, this Court stated, "no aspect of our constitutional analysis turns on" the question whether the announce clause and commit clause are the same. *Id.* at 773 n.5.